

Testimony of

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April 8, 2004

Testimony of S. Mark Lindsey
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before the Committee on the Judiciary
United States Senate
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Mr. Chairman, members of the Committee, I am very pleased to be here today to testify on behalf of the Secretary of Transportation concerning the need for stronger Federal criminal laws, to deter terrorist attacks and other violence against railroad carriers and mass transportation systems. This hearing is especially timely in light of the March 11 attacks on four commuter trains in Madrid, the subsequent discoveries of bombs under railroad tracks in both Spain and France, and the intelligence reports that terrorists might try to bomb rail lines and buses in major U.S. cities this summer.

Passenger railroads and mass transportation systems pose attractive targets for terrorist attacks because of the large concentration of people, the difficulty of securing such open and extensive systems, and the fact that such attacks can be highly disruptive to the economy. While freight railroads carry only a small number of people as crew, they are likewise attractive targets for terrorists because they also operate over open and extensive systems and because they carry hazardous materials. The U.S. Department of Transportation (DOT), the U.S. Department of Homeland Security (DHS), and other Federal agencies have been working with the railroad and transit industries, sharing knowledge, expertise, ideas, and resources to mitigate the terrorist threat to our Nation's railroads and mass transportation systems. The security efforts of the

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various Federal and private parties were detailed in testimony given to the Senate Committee on Commerce, Science, and Transportation on March 23, 2004.

While FRA and other Federal agencies will continue our efforts to safeguard our railroads and mass transportation systems, the enactment of stronger Federal criminal laws is also necessary. The enactment of legislation along the lines of S. 2289 (introduced by Senator Sessions) should help deter attacks against these systems and ensure that any acts that do occur are appropriately punished. DOT strongly supports S. 2289 and appreciates the Committee's commitment to help deter acts of violence against transportation systems.

S. 2289 would consolidate the existing "wrecking trains" statute at 18 U.S.C. 1992 and the mass transportation anti-terrorism statute at 18 U.S.C. 1993 into a new and more comprehensive section 1992. FRA and the Federal Transit Administration have worked very closely with the Department of Justice (DOJ) since 1997 in trying to secure the passage of similar legislation. DOT submitted anti-terrorism bills in 1997, 1999, and 2002, each of which contained many of the central provisions of S. 2289. DOT's legislative proposals formed the basis for the mass transportation statute, which was first enacted as part of the USA PATRIOT Act in 2001.

There are eight gaps or ambiguities in the wrecking trains and mass transportation statutes that S. 2289 would address.

First, the bill would update and slightly expand the wrecking trains statute's language regarding acts of violence against railroad carriers. The wrecking trains statute was enacted in 1940 and contains terminology that is not as expansive as that used in modern Federal criminal statutes. The bill would update the language used in referring to acts targeted at railroads (e.g.,

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replacing the term "explosive substance" with "biological agent or toxin, destructive substance, or destructive device"). And more types of railroad property and equipment would be explicitly protected (guideways, locomotive tenders, and on-track equipment). The definitions of the mass

transportation statute would be slightly modified to reflect the addition of railroads, and terrorist acts involving hazardous materials including radioactive materials and spent nuclear fuel. Second, the bill would extend to railroads the protections that apply to mass transportation systems under the mass transportation statute. The mass transportation statute contains a much more comprehensive listing of prohibited conduct than does the wrecking trains statute. The mass transportation prohibitions cover mass transportation by air, marine, and surface transportation. While these statutory prohibitions clearly apply to attacks against commuter railroads, and arguably apply to Amtrak and tourist railroad operations as well, the massive freight railroad operations of this country are not covered. The vulnerabilities of freight shipments--whether spent nuclear fuel or other hazardous materials--need to be addressed to better protect the general public.

In particular, the following six additional acts of terrorism from the mass transportation statute would be made applicable to railroads explicitly:

(1) placing a biological agent or toxin on or near railroad equipment;
(2) placing a biological agent or toxin on railroad infrastructure with intent to, or knowing or having reason to know such activity would likely derail, disable, or wreck railroad on-track equipment [The bill would also cover placement of these substances "near" railroad and mass transportation property, a provision which is not currently in the mass transportation statute.];

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(3) damaging a centralized dispatching facility;
(4) interfering with, disabling, or incapacitating any person engaged in dispatching, operating, or maintaining railroad on-track equipment;
(5) using a dangerous weapon, with the intent to cause death or serious bodily injury to an employee or passenger of a railroad carrier any other person while any of the foregoing is on the property of a railroad carrier "that is used for railroad purposes" [The highlighted qualifying language would also be made applicable to similar acts committed on the property of mass transportation systems; this qualifier is not currently in the mass transportation statute.]; and
(6) conveying or causing to be conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to engage in any of the prohibited acts.

Third, the bill would lower the evidentiary threshold for Federal prosecution of acts against railroads to the same threshold as in the mass transportation statute. The wrecking trains statute prohibits specified acts against railroad equipment and property that is engaged in interstate or foreign commerce. The mass transportation statute is much broader in scope and applies not only to acts committed on, against, or affecting a mass transportation provider engaged in or affecting interstate or foreign commerce, but also to a person who travels, communicates, or transports materials across a State line in aid of the commission of the offense. With this expanded scope, attacks against railroad carriers will be easier to prosecute. The bill also substitutes the word "knowingly" for the term "willfully," which is the mens rea the defendant must have in committing the prohibited conduct under the wrecking trains

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statute and the anti-terrorism mass transportation statute. We believe that the use of "knowingly" merely clarifies existing law since the courts have equated the term "willfully" in the wrecking trains statute with the term "knowingly." Courts construing the wrecking trains statute have held that it is not necessary to show that the defendant had a specific intent to wreck a train but merely that the defendant was aware of his acts and did not act because of ignorance, mistake, or accident, and that the defendant's conduct could substantially interfere with the interstate railroad system.

Fourth, the bill would extend to mass transportation systems a provision in the existing wrecking trains statute that makes it a crime to undermine or make the use of the mass transportation infrastructure hazardous or unworkable. In addition, the bill would add "track" and "electromagnetic guideways" to the list of types of mass transportation infrastructure protected.

Fifth, the bill would make it a crime to cause the release of a hazardous material or a biological agent or toxin on or near the property of a railroad or mass transportation provider

with the intent to endanger the safety of any person or with a reckless disregard for the safety of human life. This is a new prohibition that does not exist in current law. Freight trains haul a tremendous amount of hazardous materials-nearly a million rail tank cars and 238,000 intermodal loads of hazardous materials annually, and lesser amounts are hauled by mass transportation providers. In calendar year 2002, trains provided over a billion ton-miles of hazardous materials transportation. Rail is the predominant method of transportation for certain classes of hazardous materials that pose an especially high risk, including explosives, radioactive

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materials, and flammable solids. It is essential that the Federal criminal statutes deter terrorists from using these hazardous materials and biological agents and toxins to harm the public.

Sixth, the bill would clarify that it is not a violation of the statute to transport on railroad or mass transportation equipment or property hazardous materials in commerce that are in accordance with Federal hazardous materials transportation law and DOT's implementing regulations, or, if in violation of these provisions, the violation is merely a civil violation and not a criminal violation.

Seventh, the bill would close a gap in the "mass transportation" statute noted in the "Shoe Bomber" case, where the district court observed that the literal language of the statute prohibited an attempted act of terrorism but did not explicitly penalize such an attempt. The district court correctly rejected as meritless Mr. Reid's argument that Congress had not made attempt crimes under the mass transportation statute punishable. The bill would also update the definition of "dangerous weapon" in the mass transportation statute to cover box cutters and other previously unrecognized weapons.

Eighth, the bill would toughen or clarify the penalties for certain violations. For violations not falling in the "aggravated offense" category, the penalty would be a fine or imprisonment of not more than 20 years, or both. The bill would make it an "aggravated offense" to commit prohibited acts against a train or a mass transportation vehicle that carries a passenger or employee, radioactive waste, spent nuclear fuel, or designated hazardous materials. The general penalty for aggravated offenses would be a fine, or imprisonment for any term of years or life, or both. A term of not less than 30 years would apply to an offense involving highlevel radioactive waste or spent nuclear fuel. A sentence of either life imprisonment or capital

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punishment would apply where the offense has resulted in the death of another person. Currently, the maximum penalty under the mass transportation statute is life imprisonment. The death penalty is already available for a violation of the "wrecking trains" statute that results in a death. The bill would correct this anomaly by making available the death penalty for attacks against mass transportation systems that result in a death of a person. Recently, a Federal district court ruled that the wrecking trains statute does not impose a mandatory minimum sentence of life imprisonment or death against an individual who willfully derailed a freight train killing the conductor and seriously injuring the locomotive engineer. The bill would make clear that if a violation of the statute results in a death, that the court's choice would be to impose a sentence either of life imprisonment or the death penalty.

Conclusion

Federal agencies, working in cooperation with the railroads and mass transportation systems, have been working hard to prevent terrorist attacks against our Nation's railroads and mass transportation systems. With the rest of the senior leadership team at DOT, FRA is committed to this effort to improve transportation security by the relentless pursuit of this goal by Transportation Secretary Norman Mineta. His actions on September 11 to protect the flying public, his stewardship of the creation of the Transportation Security Administration (TSA), his leadership in making the transition of the TSA and Coast Guard to the DHS, all are accomplishments which provide us all at DOT a high standard by which to gauge our own efforts.

The Department appreciates the Committee's continued efforts to deter terrorist activity and protect the Nation's railroads and mass transportation systems. We are ready to work with

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you on improving the Federal criminal statutes in order to bring about an even safer and more secure rail transportation system. Thank you for the opportunity to appear before your Committee, and I welcome the chance to respond to your questions.

